SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

THOMAS W, POTTER, APPELLANT,

vs.

MARY HALL.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This case originated in the District Court in the County of Canadian and Territory of Oklahoma by the appellant as plaintiff filing in that Court a statutory petition in ejectment to recover possession of the N. W. ¼ of Section 4, Township 12, North of Range 7 West. (For copy of petition see printed record page 3.) To this petition the appellee filed in answer a cross-petition alleging that she is the widow of Gilman C. Hall, who was a homestead settler upon the land in controversy, and that the plaintiff filed contest against Mr. Hall's entry upon the ground of prior settlement; that in the hearing before the Register and Receiver it was found and recommended by the Register and Receiver that the appellant is disqualified from acquiring any right in the land in controversy by reason of having entered upon and occupied the lands in the Oklahoma country

prior to the noon of April 22, 1889; that an appeal was filed to the Hon. Commissioner of the General Land Office which was sustained and the land awarded to Potter; that an appeal was then taken by Hall to the Hon. Secretary of the Interior Department which was sustained and the land awarded to Hall, but afterwards upon Potter's motion for review, overruled, and it was held by the Hon. Secretary that the plaintiff was not disqualified from making entry on said land and the said lands were awarded to the plaintiff Potter, it having been found that he was the prior settler thereon; that patent had been issued from the government of the United States to the said plaintiff, and that it was by reason of the misapplication of the law to the facts found that the plaintiff secured said patent, alleging that the same was the property of the defendant by law and equity, and that the plaintiff held only the naked title in trust for the use and benefit of the said Defendant Hall, and prayed for a decree directing the plaintiff to convey the lands to the defendant.

Copies of the opinion of the Register and Receiver and the two opinions of the Secretary of the Interior are attached to the answer and cross-petition (See printed record, pages 4 to 13, inclusive, for copy of cross-petition with exhibits). To this answer, the plaintiff filed a demurrer for want of facts to constitute either defense or affirmative right of action, which demurrer was overruled, and exception taken by the plaintiff and plaintiff electing to stand upon such demurrer, decree passed in

favor of the defendant directing the plaintiff to convey the lands to the defendant, to which exceptions were duly preserved (See page 14 of record for decree) A petition in error was filed in the Supreme Court of the Territory of Oklahoma and that court affirmed the judgment of the district court (See printed record, page 17, for the opinion of the Territorial Supreme Court.)

From the judgment of the Territorial Supreme Court an appeal is filed in this court. The entire case turns upon the Exhibits attached to the defendant's cross-petition.

These decisions attached as exhibits to said answer and cross-petition are as follows:

Copy.

United States Land Office,
Oklahoma City, O. T., November 7, 1891.

Thomas W. Potter,	Envolving H. E. No. 5077
vs.	for N. W. ¼; Sec. 4, Tws. 12
Gilman C. Hall.	N.; Range 7 W.

"Ex. 'A.'"

This tract of land was originally involved in the townsite applications of town of Harrison, which matter was finally disposed of by the Hon. Commissioner's letter "G" of March 11, 1891, leaving this tract of land to be disposed of between the agricultural claimants.

Gilman C. Hall made H. E. No. 5077 for said tract on Jan. 13, 1890.

Thomas W. Potter filed affidavit of contest against

the town-site application on May 8th, 1889, alleging prior settlement.

On March 4th, 1890, Potter filed affidavit of contest against the entry of Hall in which he alleges prior settlement on April 22, 1899, that he made application to enter said land (tract) on May 7th, 1889, which was rejected for conflict with the previous town-site application, from which action he appealed, that said Hall was a soldier in the regular army and could not establish a legal residence on said tract and that said Hall has abandoned said tract. A number of other allegations are embraced in said contest which are not material and state no cause of action.

The cause was set for hearing and both parties appeared, waived notice, and submitted their testimony. As we understand this case the issues involved are: First: The prior settlement of Potter and incident thereto his qualifications as a homesteader. Second: The qualifications of Hall as a hometead entryman. Third: The abandonment of Hall or failure to establish residence as required by law.

Under the evidence submitted by both parties we find that Potter made settlement upon said tract on the 22nd day of April, 1889, and that he has established residence and maintained the same as required by the homestead laws.

That Hall established residence upon said tract with his family in October, 1889, and has maintained

said residence to the time of trial, though he has been absent most of the time on military duty.

As to the questions of Potter's qualifications, it is shown that for some time previous to the opening of Oklahoma to settlement he has been in the employ of the Indian agent in charge of the Cheyenne and Arapahoe agency, which reservation adjoins the Oklahoma lands on the west. On the morning of April 22, 1889, he was directed by the Indian agent to take charge of 15 Indian policemen and proceed to the east line of the Cheyenne and Arapahoe reservations and preserve order and prevent any settlement on the same. In pursuance of this order, Potter, went to the vicinity of this land on the forenoon of April 22nd, 1889, and during said forenoon went across the line and onto the said tract and ordered persons off the same. Immediately after twelve o'clock he made settlement upon said tract. The authority of Potter obtained from the Indian agent, was only coextensive with the Cheyenne and Arapahoe Indian reservation and did not extend to the Oklahoma lands. His orders were to prevent settlement being made on the reservation and not that he should prevent settlement upon the Oklahoma lands. When he crossed the land onto this tract before the legal hour, he became a trespasser, the same as any other person not clothed with authority. The fact that he exhibited anxiety to keep this tract clear and exceeded his authority so far as to leave the reservation and order people off of this tract would raise a very strong influence (in-

ference) that he had this particular tract in view and intended to settle upon it.

The evidence fails to show that any very valuable or permanent improvements have been made upon this tract by either claimant. In view of all the facts we think the equities are with the entryman, Hall, and that Potter is disqualified from making homestead entry for the said tract.

We therefore recommend that the contest of Potter be dismissed, his application to enter rejected and that the homestead entry of Hall remain intact. 30 days are allowed for appeal.

JNO. H. BURFORD, Register.
J. C. DELANEY, Receiver.

Copy.

Ex. B. R. B.

Thomas W. Potter,
vs.
Gilman C. Hall,

February 19, 1894.

The Commissioner of the General Land Office.

Sir: This record presents the appeal of Mary Hall, widow of Gilman C. Hall, deceased, from your office, decision dated July 7th, 1892, in the case of Thomas W. Potter vs. said Gilman C. Hall, involving the S. 1-2, N. W. 1-4 and lots 3 and 4 section 4, twp. 12, N. R., 7, W., Oklahoma City, Oklahoma.

Also the controversy arose upon contest alleging

prior settlement and also that Hall being in the military service of the United States was not qualified as a homesteader, and that he, Hall, had abandoned the land, initiated, March 4th, 1890, against Hall's homestead entry made for the same, January 13, 1890.

By its said decision your office reversed that of the register—receiver sustained Potter's contest and held the entry of Hall for cancellation. The pending appeal is from this judgment.

This history of the case and the material facts are set out in the decision appealed from and need not be restated in detail. The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889; shortly before this date, Potter had been appointed by the Indian agent of the Cheyenne and Araphoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The east line of the Cheyenne and Arapahoe reservation is also the west line of the lands opened for settlement as aforesaid and is within possibly a quarter of a mile from the tract in question. On the morning of April 22, 1889, some three or four hours before the hour of noon, Potter whom it seems was at said line, seeing some freighters camped on the land involved went thereon to order them off, he then returned to the line and at the hour of noon started in the race for a claim, he reached the land before any of his competitors, and as he states commenced his set-

tlement at one-half or one minute after 12 o'clock.

In my opinion the facts just stated sustain the conclusion reached by the local officers to the effect that Potter was not qualified to enter the tract in question, by going into the Territory on the morning of April 22nd, 1889, before the hour when the lands therein were opened to settlement, he necessarily secured an opportunity to observe the various tracts lying near the line and the ways of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the land in question makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an advantage over rival claim-seekers. It follows under the prevailing rulings (Dean vs. Simmons, 17 L. D. 536), and cases cited, that his application to enter the tract in question must be rejected.

The fact that the entryman, Hall, was in the army is not of itself sufficient to invalidate his entry, (Shannon vs. Hoffman, 4 L. D. 399) nor does the evidence, (Potter's claim being eliminated from the case) warrant its cancellation on the ground of abandonment.

The entry of Hall will accordingly remain intact. The foregoing deposition of the case renders it (unnecessary) for me to discuss the other questions presented by the record. The decision appealed from is reversed. Herewith I return the papers.

Very respectfully,

HOKE SMITH, Secretary.

Exhibit "C."

Department of the Interior,

Washington, D. C., December 5, 1895.

Thomas W. Potter, vs. Gilman C. Hall. } On Review.

Sir: On January 13, 1890, Gilman C. Hall made homestead entry on S. 1-2 of the N. W. 1-4 and lots 3 and 4, section 4, twp. 12, N. R. 7 W. of the land district of Oklahoma City, Oklahoma.

On March 4, 1890, Thomas W. Potter filed an affidavit of contest alleging prior settlement and that Hall had abandoned the land, and was disqualified by reason of his being in the military service of the United States.

The case having reached this department through the course of procedure it was here held February 19, 1894, L. & R. N. O. 281, p. 201, that Potter having entered the Territory of Oklahoma before 12 o'clock noon April 22nd, 1889, was disqualified to make homestead entry therein and, that the evidence did not warrant the cancellation of Hall's entry on the ground of abandonment. Potter has filed a motion for review. the various grounds of which are for the purpose of argument condensed by his counsel into the two following:

"1. In holding as a fact that Potter by entering the Territory prior to noon, necessarily or in any way,

secured an opportunity to observe the various tracts of land lying near the line, or thereby secure any advantage over other claim-seekers and particularly over Gilman C. Hall."

"2. In holding that by reason of entering said Territory in the line of duty, Potter was disqualified under the law from entering any land, 'in the Territory.' "

The decision on review sets out a statement of the facts on which its conclusions are based as follows:

The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889. Shortly before this date Potter had been appointed by the Indian agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same. The said east line of the Cheyenne and Arapahoe reservations is also the west line of the lands opened to settlement, as aforesaid, and is within possibly a quarter of a mile from the tract in question.

On the morning of April 22nd, 1889, some three or four hours before the hour of noon, Potter, whom it seems was at said line, seeing some "freighters" camping on the tract involved, went thereon and ordered them off, he then returned to the line and at the hour of noon started in the race for the claim. He reached the land before any of his competitor and as he states commenced his settlement at one-half or one minute after twelve o'clock.

Accepting this statement as correct and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the land and the way of reaching them, so that he obtained information that gave him an advantage over rival claim-seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country to settlement, he had lived in close proximity to the land in dispute. He had nothing to gain or to learn. Therefore, by the short excursion with which he is charged and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point. He neither gained or sought advantage and it was error to hold that under the circumstances of entry into the Territory, he was disqualified thereby.

Proceeding now to consider the case on its merits, the evidence seems conclusive that Potter was the prior settler, that he established residence upon the land on April 22, 1889, the day of the opening, and maintained it for several months, may be considered as proven.

The efforts of the defendant, Hall, were mainly directed on this branch of the case, to showing abandonment by Potter, but I do not think the testimony sustains his contentions, the latter was called away from

home on business during the fall of 1889, and the winter following, but those absences were not of a character to indicate a purpose to abandon his homestead. During that period he made two trips to Carlisle, Pa., in charge of children destined for the Indian school located at that place and spent the winter there in doing work in some capacity, returning in the spring. He is a young man without any family and was accumulating means and swears that his absence from the land was rendered necessary by his financial condition.

Both, Potter and Hall have improvements, in neither case very expensive or valuable, but sufficient for both to show good faith, but the former's possession is the stronger by virtue of the priority of his settlement. That fact, however, is sufficient to determine the controversy in his favor.

The decision heretofore rendered is therefore revoked, and set aside and your office decision holding Hall's entry for cancellation is affirmed. The papers in the case are herewith returned.

Very respectfully,

JOHN M. REYNOLDS,

Acting Secretary.

The appellant's assignment of errors is found on page 24 of the printed record and is as follows:

"Now, on the 20th day of August A. D. 1901, "comes the said plaintiff in error by J. H. Everest and "John W. Shartell, his solicitors and says that the de-"cree and judgment rendered in this cause in this "court on the 6th day of July A. D. 1901, are erroneous "and against the just rights of the said plaintiff, for the "following reasons:

"First. Because this court erred in affirming the "judgment and order of the court below, appealed "from.

"Second. The court erred in holding that as a "matter of law that the acts of plaintiff amounted to a "disqualification to make entry of the lands in contro-"versy under the homestead laws of the United States.

"Third. The court erred in affirming the action of "the court below in overruling the demurrer of the "plaintiff in the court below to the answer and cross-"petition of the said Mary Hall, the defendant in the "court below, to-wit: the district court of the county of "Canadian and Territory of Oklahoma."

"Fourth. The court erred in affirming the action "of the court below in overruling the demurrer of the "plaintiff in that court because and for the reasons that "the answer and cross-petition of the defendant in the "court below failed to state sufficient grounds for "equitable relief or for the cancellation of the patent "issued to the plaintiff for the land in controversy by "the Government of the United States.

"Fifth. This court erred in sustaining the action "of the district court of Canadian county in rendering "judgment and decree for the transfer of the legal title "of the land in controversy from the plaintiff to said "defendant.

JOHN W. SHARTEL and
J. H. EVEREST,
Solicitors for Plaintiff in Error."

Under these assignments of errors we desire to discuss two propositions:

FIRST.

THE ANSWER AND CROSS-PETITION WAS INSUFFICIENT TO RAISE THE QUESTION SOUGHT:

(a) For failure to allege all the facts found in the departmental proceedings;

(b) For failure to allege the specific mistakes of law made in the Interior Department upon the facts found;

(c) For failure to offer to do equity in restoring to the plaintiff the legal expenses incurred in acquiring title to the land.

SECOND.

THE ACTS OF THE PLAINTIFF IN ENTERING THE OKLAHOMA COUNTRY ON THE MORNING OF THE DAY THOSE LANDS WERE THROWN OPEN TO SETTLEMENT DID NOT DISQUALIFY HIM FROM MAKING ENTRY ON ANY OF SUCH LANDS.

FIRST.—*The answer and cross-petition was insufficient to raise the question sought to be raised.*

(a) *For failure to allege all th facts found in the departmental proceedings;*

The answer and cross-petition sets out only the recommendation of the register and receiver. The first

opinion of the Secretary of the Interior reversing the decision of the Commissioner of the General Land Office and the decision of the Secretary upon review reversing his former decision and affirming the decision of the Commissioner of the General Land Office holding the Hall entry for cancellation and permitting Potter to file. We insist that without the decision of the commissioner of the General Land Office it is impossible to understand with clearness or certainty what the ruling of the Interior Department was, and because by reference it is seen that they are mutually dependent and that the omission of the opinion of the Commissioner which was affirmed makes it impossible to fairly ascertain what facts were actually found in the Interior Department.

(b) *For failure to allege the specific mistakes of law made in the Interior Department upon the facts found.*

It is a well settled doctrine of this court that in order to set aside the conclusion of the Interior Department in the sale and disposition of public lands by reason of its having committed a clear mistake of law in awarding the land to the wrong party that the mistake of law must be specifically pointed out and clearly alleged; this was not done.

Marquez vs. Frisbie, 11th. Otto. 473. (Vol. 25 Law. Ed. Page 800).

United States vs. Atherton, 12th. Otto, 372-375; (Law. Ed. Vol. 26, 214).

(c) *For failure to offer to do equity in restort-*

ing to the plaintiff the legal expense incurred in acquiring title to the land.

The record shows that upon making a final proof the plaintiff paid certain fees to the register and receiver. The law requires him in this process to pay certain other fees. (See Record, page 4; also Revised Statutes, sections 2290 and 2238). There was neither allegation of tender nor offer in the bill to refund nor did the decree in defendant's favor make any provision for refunding these charges. We think this is a case where an offer to do equity is a condition precedent to obtaining equity.

Thomas J. McQuiddy vs. Ware et al, 20th. Wall. 14-20. Law. Ed. Vol. 22, page 311.
Buchannon vs. Upshaw, 1 How. 56. Law Ed. Vol. 11, page 46.
Williams vs. Gibbes, 20th How. 535 Law Ed. Vol. 15, page 1013.

In addition to the fees required by law which Potter must have paid to acquire title, the record shows that Potter had improvements on the land which the court will know judicially were of some value. The Defendant Hall cannot expect to appropriate these in a court of equity, without compensation and her answer and cross-complaint nowhere, either specifically or generally offers to do this or to do equity.

SECOND.

THE ACTS OF THE PLAINTIFF IN ENTERING THE OKLAHOMA COUNTRY ON THE MORNING OF THE DAY THOSE LANDS WERE

THROWN OPEN TO SETTLEMENT DID NOT DISQUALIFY HIM FROM MAKING ENTRY ON ANY OF SUCH LANDS.

It is admitted in all of the findings that the plaintiff excepting only the question of his entry into the lands in question on the morning of the opening was in all respects a qualified entryman. It is also admitted that he initiated the first settlement upon the land in question. The substance of the first opinion of the Secretary of the Interior is that Potter was at the border of the land near the Cheyenne and Arapahoe Agency in charge of a squad of fifteen Indian policemen under orders from the agent to proceed to the line to preserve order and to prevent any settlement upon the same, and that seeing some campers located in the country, on, or near the land in question, he proceeded to where they were and ordered them out of the country, returning to the line and re-entering the country along with the other settlers at the hour of noon. It was the Secretary's opinion that this entry was for the purpose of, and that Potter did gain an advantage thereby. The second and final opinion finds that Potter was at the border of the land acting under orders from a Government officer, in charge of a squad of Indian policemen and for the purpose of preserving order and preventing settlement on the reservation or in the Oklahoma country prior to the hour of noon, and it is expressly found that Potter in going into the Oklahoma Country and ordering the settlers out

was proceeding strictly in the line of his duty. It is also found that Potter had been a resident of the country nearby for six years, had lived in sight of the land in controversy and had been familiar with it for years; that his excursion into the country on the morning of the opening was not for the purpose of gaining any advantage over the settlers and that he did not gain any advantage thereby. The Supreme Court of the Territory took the view that the case of Smith against Townsend compelled the construction of the Act of Congress opening Oklahoma to settlement, that no entry during the prohibited period into the Oklahoma country no matter how innocent could be explained or reasoned away; that the prohibition of the Act is absolute. The Interior Department at no time has taken that restricted view either of the act or of the effect of the decision in the Smith against Townsend case. It has been for a period of some eight or ten years extending the spirit of the act to cases not within its letter and excluding cases within the letter of the Act but not within its spirit. A few of the many instances will subserve to illustrate the settled construction adopted by the Interior Department.

Donnell vs. Kittrel, 15th. L. D. 580 was a case in which the settler in the night time and two days before the opening of the country to settlement wandered two miles inside of the Oklahoma territory and on discovery of his mistake immediately withdrew. The Secretary of the Interior held that he was not disqualified. "He neither 'took nor held possession' of any "land; he had no unlawful purpose in passing within the "line, and no one was injured thereby. He did not "enter within the line 'with a view and purpose of set-"tlement of any part thereof.' He gained no advan-"tage thereby, hence, the penalty provided by the "statute and the proclamation for one who violated the "spirit thereof for the purpose of gaining preference "should not be visited upon him."

Roff vs. Coplin, 18th. D. D. 128, was a case in which an entryman had for several years been grazing cattle in the Oklahoma country, and that about the time of the issuance of the President's proclamation he removed his cattle from the Oklahoma country, but on two occasions they strayed back in that country and on each occasion he went into the country and drove them out. The last occasion was in the immediate vicinity of the land in question but he was on account of his previous acquaintance with the country, not only being thoroughly familiar with the land in question but with the entire country, held not to be disqualified. In passing on this question the Assistant Attorney General says: "The thorough "knowledge of that vicinity gained by the defendant "prior to the inhibition imposed by the President's "message precludes the theory that the defendant went "into the territory on these two occasions for the pur-"pose of obtaining knowledge of the land or for any "other purpose than that stated. I do not think that "his presence there on these two occasions under the "circumstances should be construed to disqualify him,

"especially in view of the fact that he was compelled to "keep his stock out of the country."

In Higgins vs. Adams, 18th. L. D. 508, it was held that an entry made by a settler on the morning of the day of the opening going one-fourth of a mile into the country for the purpose of watering his team and upon completing his objeit, returning to the boundary and making an even start, did not disqualify the entryman.

In the matter of W. E. Morris, 22nd. L. D. 613, the applicant lived near the line between the Cherokee outlet and the Creek Nation and had habitually for years obtained water supply for his family and his stock from the Cherokee outlet and in the pursuit of this object solely had been within the outlet during the prohibited period. It was held that he was not disqualified from making entry to lands in that country.

In Curnutt vs. Jones 21st. L. D. 40, it was found that Jones was thoroughly familiar with the country and during the prohibited period had visited Oklahoma City post-office for the purpose of securing his mail which he had customarily received at that post-office. The entryman in that case built a foundation for a house on the land in controversy before the act opening the country to settlement was passed. It was held that he was not disqualified. It was also held in this case that his trips to Oklahoma City in view of his previous intimate knowledge of the country could not by any possibility add anything in the way of information or advantage. We call the court's attention especially to the case of Curnutt vs. Jones as being a complete review of all of the previous decisions of the Department covering different facts and bringing them into harmony around the one principle, that if the entry upon said lands is entirely disassociated from any attempt to gain advantage, and the party is outside of the country at the hour of the opening there is no disqualification, and the view is there brought into prominence that the

object of the law was to give every settler an equal chance in the race for a home, and if that is attained the law is fulfilled.

In Tipton vs. Maloney 23 L. D. 186, passing through the country by an entryman during the prohibited period along the highways so as to reach a point from which he desires to make a race does not disqualify him from acquiring title.

In Metz vs. Seeley, 21st. L. D. 148, the entryman came into the country in the employ of the A. T. & S. F. Railway Company conducting a boarding house. On the day previous to the opening of the country he went outside of the country and re-entered at the hour of noon on the day folliwing. In passing on this case the Honorable Secretary says:

"The crucial tests in these cases, when a prima facie showing is made that a person had violated the letter of the law by going inside the territorial limits, are: first, was such entry lawful? Second, was the party so coming within the letter of the law, outside at the hour of opening? Third, did his presence inside the territory during the prohibited period result in giving him an advanatge over others in reaching and selecting the land settled upon?

See also the case of McCormick vs. Turner 21st. L. D. 151. Lizzie H. McCormick, who held the entry resided at Fort Reno within the lands to be settled upon, with her father, and with permit of Secretary of War, as dairyman at the Fort and she assisted him in conducting his dairy. She was not acquainted with the land in controversy and on the day previous to the opening she left the country and returned at the proper time. The Interior Department held that she obtained no advantage over others by reason of her residence and presence in the Territory during the prohibited period and therefore did not violate the spirit of the law.

In Jackson vs. Garrett, 25th. L. D. 273, the Secretary refused to decide as a fact whether Garrett was on the land previous to the time of the opening because it is clear that he could not have had any object by so doing as he was outside of the country at the time of the opening and made the race along with other settlers, and having resided for several years in sight of the land on the outside of the country was not therefore disqualified even if he had been on the land between the Act of Congress and the Proclamation opening it to settlement.

See Hensly vs. Waner, 24th. L. D. 92. This case arose in Pottawatomie county, a part of which was opened for settlement and a part was set apart for an individual allotments of Indians. Hensley had for several years prior to the Act of Congress and Proclamation opening said land to settlement, been residing in that country as a tenant of Indians, but previous to the opening and during the prohibited period, he withdrew from the country and made the run along with the other settlers. There was a very serious question in this as to whether Hensley was rightfully in this country at any time, having leased without authority from the Indian Department. After Hensly removed from the country and during the prohibited period he went back into the country to look after crops which he had growing on his leased premises. It was held that Hensley was not disqualified. "It does not appear "that Hensly gain any advantage by his presence in "the country during the prohibited period. It is true "he resided within one mile and a half of the land he "now seeks to enter. It is also true that he had abun-"dant opportunity to gain a knowledge of the land be-"fore the date of the act opening the country to settle-"ment, March 3, 1891; and his residence within the "country after that period did not, I think, give him "any additional information."

In the case of Henderson vs. Smith 28. L. D. 303,

it was held that a homesteader who was hauling flour along a highway past the identical piece of land in controversy during the prohibited period but which was in sight of the entryman's premises outside of the land in controversy, and which could give him no additional information respecting the land, did not violate the act opening the Cherokee outlet to settlement. Numerous other cases are cited on various opinions from the Interior Department, cited in this brief and they all adhere to the doctrine that the entry must be within the mischief intended by the law in order to prove it within the law itself. This harmonizes indeed with the act of Congress and the Proclamation. It is also held that even though the entryman himself may not have been within the Territory if he employs some agency within the territory during the prohibited period whereby he gains advantage he is disqualified from entering the land. Thus, if a man by the aid of another obtains horses along the route he intends to follow so he may outstrip his competitors he is disqualified.

Blanchard et al vs. White, 13th. L. D., Page 66.
Guthrie Townsite vs. Paine, 13th. L. D., page 562.
White vs. Marvel, 18th. L. D., page 560.
Mullen vs. Porter, 20th L. D., page 334.

The reasoning of the court below turned upon three propositions:

FIRST:—A denial of the fact or mixed conclusion of law and facts that the entry was made in the discharge of Potter's duty.

SECOND:—The construction of the prohibition against entering the country as being absolute and that everything that is within its letter is within its spirit.

THIRD:—That this court in Smith against Town-

send, 148 U. S. 490, in Paine against Robinson, 169 U. S. 323, and Calhoun against Violet, 173 U. S. 60, took that view of the act in question.

We insist that the finding of the Secretary of the Interior that Potter went into the country to warn campers who had gotten over the line to get out in the discharge of his duty in charge of the border police was, at least, a mixed conclusion of law and fact if not strictly a finding of fact, which the courts must recognize as final and accept as conclusive.

Marquez vs. Frisbie, 11th. Otto. 473-479. (Law. Ed. Vol. 25, Page 800).

Lee vs. Johnson, 116 U. S., Page 48. (Law. Ed. Vol. 29-570).

Jonhson vs. Towsley, 13th. Wall. 72. (Law Ed. Vol. 20-485).

Warren vs. Van Brunt, 19 Wall. 646. (Law. Ed. Vol. 22-219).

United States vs. Minor, 114 U. S., 233. (Law. Ed. Vol. 29-110).

Under the authorities just cited we also insist that the finding that Potter's entry into the country was harmless so far as giving him any advantage over other settlers was concerned, is equally conclusive, and that the court below improperly brushed it aside.

All three of the decisions of this court cited involved the presence of persons within the prohibited area at the hour of the opening and they each expressly disclaimed a decision of the question as to what the effect would be if a person were innocently in the country

previous to the hour of the opening gaining no advantage thereby retiring therefrom and should start abreast of all others seeking homes. The Court below cited Smith against Townsend as authority for the construction that the prohibition is absolute upon everyone who entered the country during the prohibited period whether "rightfully or wrongfully" and whether they gained any advantage thereby or not and whether they made the race with other settlers or not, yet, a reading of Smith against Townsend shows that the opinion in that case expressly disclaims a decision upon that question, and that the question decided was: "It is enough now to hold that one who was within "the territorial limits at the hour of noon of April 22 "was, within both the letter and the spirit of the stat-"ute, disqualified to take a homestead therein."

We do not think that in view of this express disclaimer and in view of the import given to the language of the act in Smith against Townsend: "it was evidently "the expectation of Congress that they would be en-"forced in the spirit of equality suggested by the gen-"erality of the language," and by the strong intimation shown in the opinion that under such circumstances while a person might be within the letter of the act he would not be within the spirit, lends color to the reasonable view that an equitable construction of the act as intended by Congress would not disqualify Potter on account of the short excursion previous to the hour of opening. We submit the various rulings of the Interior Department above cited, reasoning upon this feature of the question as a sound exposition of a sound

construction of this law, where the result arrived at that even though one be not within its letter yet within its spirit he is disqualified and though one be within the letter and not within its spirit he is not.

We venture also the suggestion that the long line of adjudicated cases in the Interior Department on this subject ought not to be as lightly disturbed or brushed aside as was done in the court below. We also submit in this connection that even though it be within the province of the court below to set aside the conclusions of fact or mixed conclusions of law and fact of the Interior Department and to say that Potter's excursion into the country was not in the line of his duty yet that does not end the case. It is clear from the facts found that he so understood his duty and acted accordingly, and if he was acting upon a mistaken sense of his duty that certainly would not disqualify him from acquiring any of the lands, as we regard the entry into the country which disqualifies as necessarily bearing a relation to a violation of the spirit of the act in securing an undue advantage thereby, and we submit that the excursion on the morning of the opening made by Potter whether strictly legal and strictly authorized was innocently made, and entirely separated from any thought of getting the start of others in the final race or making a selection and that he is in as good a plight as the man who aimlessly or mistakenly wanders across the line but retires to the borders for the final race upon his discovery of his error. The construction

given to the act by the court below is at odds with the usual interpretation of remedial legislation and we submit has too much strictness to warrant its acceptance and that the decree of the court below should be reversed and remanded with instructions to dismiss the cross-petition of appellant.

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